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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 330

GOLDBLATT BROS., INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

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*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Goldblatt Bros., Inc., respectfully prays the issuance of a writ of certiorari to review the judgment in the United States Circuit Court of Appeals for the Seventh Circuit entered on May 23, 1942 affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW.

The District Court filed no opinion. The opinions in the Circuit Court of Appeals (R. 208-215) are reported at 128 F. (2d) 576.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 23, 1942 (R. 216). A petition for re-hearing was denied June 16, 1942 (R. 217). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. In a suit under the Bulk Sales Law of Illinois (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) against a bulk sales vendee are federal income and social security tax returns filed by the bulk sales vendor admissible to show the existence and the amount of the taxes claimed against the bulk sales vendor, where it appears that the tax returns were filed subsequent to the consummation of the bulk sale and at a time when the bulk sales vendor had no assets and was no longer engaged in business?

2. Within the meaning of the Bulk Sales Law of Illinois (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) is respondent a creditor for income and Title IX social security taxes prior to the expiration of the taxable year during which such taxes are regularly assessable and which, in fact, have not been assessed?

STATUTES INVOLVED.

The pertinent statutes are set forth in the Appendix.

STATEMENT.

The petitioner is the owner of ten department stores located in Chicago and vicinity. Prior to November 22, 1937 the New Dahl Corporation operated shoe repair concessions in petitioner's stores (R. 18). The relationship between the petitioner and New Dahl was solely that of lessor and lessee, the petitioner having no control or authority over the conduct and operation of New Dahl's business (R. 24, 34, 38, 98-9). For some time prior to November 22, 1937 New Dahl experienced severe financial difficulties (R. 89-92). Norman Dahlman, president of New Dahl, who, together with members of his immediate family, owned all of New Dahl's stock (R. 24, 34-5), offered to sell the business to petitioner (R. 93). The offer was at first refused (R. 94), but after the payroll checks of New Dahl's employees were dishonored for payment (R. 19, 107) petitioner undertook to purchase all of New Dahl's assets, with the exception of certain uncollectible accounts receivable, in conformity with the provisions of the Bulk Sales Law of Illinois. (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) (R. 33-44, 53, 97, 98, 139-41.)

In fine, the Illinois Bulk Sales Act declares bulk sales other than in the ordinary course of trade fraudulent and void as against creditors of the vendor unless the vendee, at least five days before the consummation of the sale, procures in good faith from the vendor a sworn statement containing a full, accurate and complete list of the vendor's creditors, their addresses and the amounts owing to each as nearly as may be ascertained, or, in the event there are no creditors, a sworn statement to that effect. The Act further requires the vendee to send a notice in writing notifying each of the creditors listed in the sworn state-

ment or of whom the vendee has knowledge, of the proposed purchase. Failure to comply with the requirements of the Act makes the vendee liable to the claims of the vendor's creditors.

The contract of sale between petitioner and New Dahl was entered into on November 17, 1937 (R. 52). Paragraph 3 of the contract (R. 53) specified "* * * that the parties hereto will comply in all respects with the terms and conditions of the Bulk Sales Law of the State of Illinois. * * *" Contemporaneously with the execution of the contract, Norman Dahlman, as president and duly authorized agent of New Dahl, executed a bulk sales affidavit (R. 53) stating "* * * that the attached schedule is a full, accurate and complete list of all of the creditors of the said New Dahl Corporation * * *" and that the affidavit was made "* * * in compliance with the Bulk Sales Law of the State of Illinois and for the purpose of inducing Goldblatt Bros., Inc. to consummate a purchase of the assets of said New Dahl Corporation." There was appended to the affidavit (R. 54-55) a list of creditors. Notices required by the Act were duly transmitted to these creditors (R. 52, 56) and petitioner made aggregate payments of \$29,676.75 in full discharge of the claims listed in the bulk sales affidavit (R. 56). Respondent was not included in the list of creditors.

Respondent brought this suit against petitioner on the theory that respondent was a creditor of New Dahl within the meaning of the Bulk Sales Law of Illinois and that petitioner had knowledge of that fact, and that even though respondent was not included in the list of creditors attached to the bulk sales affidavit, petitioner had not com-

¹ This sworn statement was, of course, false. It is to be noted that Dahlman directed the preparation of the tax returns (R. 115) and actually gave oath as to the accuracy of the 1937 income tax return (R. 186).

plied with the requirements of the Illinois Bulk Sales Act in failing to serve notice of the bulk sales transaction upon the respondent and was therefore liable for respondent's claims against New Dahl (R. 4, 45-47).

Petitioner's answer placed in issue respondent's allegation that it was a New Dahl creditor and petitioner's compliance with the Illinois Bulk Sales Law, including the question of petitioner's knowledge that respondent was a creditor of New Dahl on the date of the bulk sales transaction (R. 7). The issues were resolved by the District Court adversely to the petitioner. Judgment was entered in the aggregate amount of \$4,983.14, which may be broken down as follows:

1936	Income taxes, balance due on the principal amount of.....	\$ 717.58
	Plus accrued interest thereon to the date of payment hereof in the amount of	149.74
	making a total of.....	867.37
1937	Income taxes, principal amount of....	1,311.79
	Plus accrued interest thereon to the date hereof in the amount of.....	239.82
	making a total of.....	1,551.61
Nov.		
1937	Social Security taxes, Title VIII in the principal amount of.....	39.30
	Plus accrued interest thereon in the amount of	7.70
	making a total of.....	47.00
Year		
1936	Social Security taxes under Title IX, in the principal amount of.....	373.07
	Plus accrued interest thereon.....	80.73
	making a total of.....	453.80
Year		
1937	Social Security taxes, under Title IX, in the principal amount of.....	1,733.58
	Plus accrued interest thereon in the amount of	329.78
	making a total of.....	2,063.36

The judgment was affirmed in its entirety by the Circuit Court of Appeals, one Judge dissenting as to petitioner's liability for New Dahl's 1937 income taxes and 1937 Title IX social security taxes (R. 208-215).

Petitioner, while remaining respectfully unreconciled to the adjudication that it had knowledge of respondent's claims against New Dahl prior to the bulk sale, accepts that finding of fact and all other findings of fact made below (R. 188) and confines this request for certiorari exclusively to the two questions of law heretofore specified. In consequence, the scope of the review applied for is limited to:

1. The admissibility of the evidence accepted by the trial court, over petitioner's seasonable objections (R. 48-50, 141), of the existence and amount of respondent's claims against New Dahl for 1937 income and Title IX social security taxes; and
2. Whether the courts below correctly concluded that respondent was a creditor for these taxes within the meaning of the Bulk Sales Law of Illinois.

The proof of New Dahl's alleged indebtedness for 1937 Title IX social security taxes and 1937 income taxes consists solely of the returns filed by New Dahl (R. 141-46, 175-186). These returns were filed only after a request by an internal revenue agent upon Norman Dahlman, the New Dahl president (R. 115). The delinquent return for the 1937 Title IX social security taxes was merely signed "New Dahl Corporation" and was filed on April 12, 1938, more than four months after the consummation of the bulk sales transaction (R. 144). This return was prepared by an internal revenue agent from "a sheet with figures on it" furnished by Hallquist (R. 116), a former New Dahl employee (R. 58). The source of these figures does

not appear. The 1937 income tax return was executed by Dahlman and was filed on March 10, 1938, more than three months after the consummation of the bulk sales transaction (R. 176). The source of the amounts reported does not appear. The New Dahl books and records were not accounted for upon the trial of the case. Dahlman testified that "the last knowledge" that he had as to the New Dahl books was that he had left them with the petitioner (R. 20). This testimony was disputed not only by petitioner's witnesses, but by respondent's witness Hallquist, who testified he saw the books at the Crest Shoe Repair Company, also a Dahlman enterprise, several months after the bulk sales transaction had been consummated (R. 60-61, 69-70, 74-5, 85, 88, 135, 138). During the investigation of the New Dahl tax liabilities shortly prior to the time the tax returns were filed, Dahlman told the internal revenue agent that the petitioner was going to pay the taxes in question (R. 113-14). It is conceded that from and after the time of the bulk sales transaction the New Dahl Corporation had no assets of value (R. 22, 72, 92-3, 104, 188).

The issue as to whether or not respondent was a creditor on the date of the bulk sales transaction within the meaning of the Bulk Sales Act of Illinois is resolved by considering the meaning of that statute as adjudicated by the courts of Illinois.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The admission of the 1937 tax returns to establish respondent as a New Dahl creditor for 1937 taxes was an important and unprecedented evidentiary ruling probably in conflict with the applicable Illinois decisions. *Illman v. Kruse*, 301 Ill. 408; *Delfosse v. Delfosse*, 287 Ill. 251.

New Dahl's "admission" that it owed taxes was simply the "admission" by one having no interest or concern in the effect of the admission. In the first place, at the time of the returns New Dahl had no assets (R. 22, 72, 90-93, 104, 188). It did not matter one whit to New Dahl whether it admitted tax liabilities of \$1,000.00 or \$1,000,000.00, nor did it matter in the least to New Dahl whether it claimed the benefit of various deductions which the law allows to taxpayers. New Dahl's only concern was to satisfy the demands of a revenue agent that the formality of filing a return be complied with (R. 115). As a matter of fact, New Dahl contended petitioner was liable for the taxes claimed (R. 113) although the contract specifically limited petitioner's liability to the obligation listed in the bulk sales contract (R. 52). In any event, New Dahl had no assets and was out of business (R. 22, 72, 90-93, 104, 188) and its tax liabilities, of whatever amount, were uncollectible. Obviously the same force and effect cannot and should not be given to an "admission" by a taxpayer who expects to pay the tax reported and an "admission" made in the belief that the liability for the tax will fall upon someone else.

Reliance by the majority of the Circuit Court of Appeals upon *Tameling v. Commissioner*, 43 F. (2d) 814-816 (R. 210) is insupportable. As pointed out in the dissenting opinion (R. 215), this case merely stands for the proposition that a taxpayer's own return can be used as an admission against him. It is a somewhat different thing to say that a tax return which in actuality admits nothing and means nothing to the person making out the return can be binding upon a third party long after the dealings between the person executing the return and the third party have completely terminated. In a controversy between the Commissioner and the tax-

payer it is not too much to ask the taxpayer to overcome the prima facie case made out by his own tax returns. However, the consequence in the case at bar of binding the petitioner to tax returns filed by a party totally disinterested in their effect was to impose upon the petitioner a burden of proof which was properly respondent's. The theory of the majority of the Circuit Court of Appeals that the returns were admissible to establish the primary liability of New Dahl and not the primary liability of the petitioner (R. 210) is untenable. This was a suit not against New Dahl but a suit against the petitioner. The admissibility of these returns should have been determined not by the rules of evidence applicable to New Dahl, but the rules of evidence applicable to the petitioner.

2. The conclusion of the majority of the Circuit Court of Appeals that the respondent was a creditor for 1937 income and Title IX social security taxes is clearly in conflict with the applicable local decisions of the State of Illinois. It is significant and vital to emphasize that although respondent's claims are for federal taxes, its right of recovery depends solely upon the law of Illinois. Federal authority here is limited to establishing the kind and amount of tax liability, if any, for which New Dahl was indebted. The respondent does not and cannot as against the petitioner, a purchaser for value, contend for any special preference or priority by virtue of its sovereignty but is confined solely to those rights and remedies of a creditor which the law of Illinois grants to private citizens (R. 4, 47). And it is only to state a corollary principle of the statutory nature of respondent's claims when we observe that in the absence of the Illinois Bulk Sales Act, respondent would have no theory of recovery as against the petitioner.

Recovery as against bulk sales vendees was unknown to the common law and in order for respondent to recover against petitioner it is well settled under the Illinois authorities that respondent's claims as of November 17, 1937, the date of the bulk sales transaction, were required to be liquidated, certain, due and owing. *Knass v. Madison & Kedzie State Bank*, 269 Ill. App. 588; *Coon v. Doss*, 361 Ill. 515; *Tipsworth v. Doss*, 273 Ill. App. 1; *Leonard Sash & Door Co. v. West Side Trust & Savings Bank*, 207 Ill. App. 3; *Smead Co. v. J. Oliver Johnson, Inc.*, 262 Ill. App. 385; *Superior Plating Works v. Art Metal Crafts Co.*, 218 Ill. App. 148; *Stony Island Trust & Savings Bank v. Stony Island State Savings Bank*, 240 Ill. App. 195.

On November 17, 1937 New Dahl's liability for 1937 income taxes was speculative and contingent: The taxable period was incomplete by forty-four days. The incidence of taxation fell not on a period consisting of ten months and seventeen days, but upon a period consisting of an entire calendar year. It was impossible for anyone to have forecast New Dahl's income tax liability for the year 1937 on November 17th of that year any more than it is possible for any citizen to now forecast his tax liability during the year 1942 when, as of the date of the writing of this petition, the applicable income tax laws have not been enacted. No one on November 17, 1937 could have foretold or anticipated New Dahl's business activities for the remainder of that year. So far as anything in the bulk sales agreement (R. 52) was concerned, New Dahl, which had retained its corporate identity, was free to undertake new business activities immediately after the bulk sale. That this did not happen, as we now know, is not in point. What does control is the fact that it could have happened and if it did, New Dahl's income tax liability for the year 1937 might, on the one hand, have been greatly increased, or,

on the other hand, reduced or entirely extinguished. Not only was the claim for 1937 income taxes contingent and speculative, but this claim was not due and owing on November 17, 1937. A taxpayer whose taxable year is equivalent to the calendar year is not required to file a return or pay any part of his tax liability until the 15th of March following the close of the calendar year for which the tax is assessable (26 U. S. C. A., Secs. 53 (a) and 56 (a)). While there are provisions in the Revenue Law for the acceleration of tax liability by jeopardy assessment (26 U. S. C. A., Sec. 146), this statutory power was not exercised in the instant case.

Likewise an examination of the relevant portions of the statutory provisions governing Title IX social security taxes (42 U. S. C. A., Sec. 1105) set forth in the Appendix clearly reflects that these taxes were not due until January 31st or more than two months subsequent to the consummation of the bulk sales transaction.

As pointed out in the dissenting opinion (R. 213), the majority of the Circuit Court of Appeals misconstrued and misapplied the Illinois Bulk Sales Act to the case at bar. There is not a single decided authority in Illinois which lends any support to the conclusion of the Court.

Winthrop v. Kournetas, 265 Ill. App. 535, cited in the majority opinion, involved a creditor who had reduced his claim to judgment prior to the date of the bulk sales transaction there involved. This case is clearly consistent with the proposition that claims to be recognized under the Illinois Bulk Sales Law must be owing, certain and liquidated as of the date of the consummation of the bulk sale.

CONCLUSION.

The importance of the questions here raised cannot be exaggerated. If a bulk sales vendee is required to assume risks as to taxes unassessed and not due and payable, regardless of a sworn bulk sales affidavit to the effect that no such liabilities exist, the amount of which taxes is speculative and limited only to the restraint and caution with which a disinterested bulk sales vendor subsequently prepares his tax returns, the result will be that all bulk sales transactions must be delayed and held in abeyance for a five-day period after notice to the federal taxing officials. Such delays and hindrances in the commercial life of the community are not contemplated or intended by the Bulk Sales Act of Illinois.

We respectfully submit that this petition for a writ of certiorari should be granted.

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August, 1942.

